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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re J.E., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

A146105

(Contra Costa County  
Super. Ct. No. J11-00644)

As in a related case, *In re C.B.* (Aug. 30, 2016, A146277) \_\_ Cal.App.4th \_\_ [2016 Cal.App. Lexis 725], the defendant in this case, J.E. (minor), appeals from a juvenile court order denying his request to expunge DNA samples from the state's DNA database after his felony offense was redesignated a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act, a measure that reduced the classification of certain crimes.<sup>1</sup> According to minor, his DNA samples should be expunged because, had his offense been classified as a misdemeanor at the time he admitted committing it, he would not have been required to submit the samples in the first place. Following the

<sup>1</sup> Unless otherwise stated, all statutory citations herein are to the Penal Code.

same legal reasoning applied by this court in *In re C.B.*, we reject minor's challenge.<sup>2</sup> Accordingly, we affirm the juvenile court's order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On November 2, 2010, a juvenile wardship petition was filed pursuant to Welfare and Institutions Code section 602, alleging that minor committed second degree robbery in violation of sections 211 and 212.5 (count one), and false imprisonment in violation of section 236 (count two). This petition was amended on November 22, 2010, to allege minor committed felony grand theft in violation of section 487, subdivision (c) (count three). On the same date, minor admitted the felony grand theft count and the remaining counts were dismissed. His maximum term of confinement was calculated to be three years.

Minor's case was then transferred from the County of San Francisco to Contra Costa County for disposition and adjudication on a previously-filed juvenile wardship petition, wherein it was alleged that minor committed the offenses of criminal threats and resisting arrest. After minor admitted the misdemeanor resisting arrest allegation and the criminal threats allegation was dismissed, the matter was transferred back to the County of San Francisco, where his mother was residing, for disposition. The juvenile court thereafter declared minor a ward of the court and placed him on probation in the home of his mother subject to various terms and conditions. Among these terms and conditions was the requirement that minor submit to DNA testing.

After several subsequent transfers, minor filed a petition for relief under section 1170.18 in Contra Costa County on June 4, 2015, requesting that his felony grand theft adjudication be redesignated as a misdemeanor, that the order requiring submission of DNA samples be vacated, and that his DNA samples be expunged from the state database. Following a hearing, the juvenile court granted minor's request to redesignate

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<sup>2</sup> We decline to restate in full our detailed analysis in *In re C.B.* in rejecting the identical legal challenge made herein. However, minor does raise in this case an additional argument in seeking reversal of the juvenile court's order based upon the equal protection clause of the state and federal constitutions that was not raised in the related case. We address, and ultimately reject, this argument separately below.

his felony offense as a misdemeanor, but denied his requests to vacate the order to submit DNA samples and to expunge his samples from the state database. On August 27, 2015, after his motion for reconsideration was denied, minor filed a timely notice of appeal.

### **DISCUSSION**

Minor's principle challenge on appeal is identical to the challenge raised in the aforementioned related case, *In re C.B.* — to wit, that the juvenile court misconstrued section 1170.18, which was added upon passage of Proposition 47, when finding that he was not entitled to have his DNA samples expunged from the state database upon reclassifying his felony offense as a misdemeanor. According to minor, his DNA samples should be expunged because, had his offense been classified as a misdemeanor at the time he admitted committing it, the juvenile court would have had no authority under the DNA and Forensic Identification Data Base and Data Bank Act of 1998, section 295 et seq. (DNA Database Act or Proposition 69), to order him to submit DNA.<sup>3</sup> (See § 296, subd. (a).) In a related argument, minor adds that the court's failure to expunge his DNA samples is a violation of his constitutional right to equal protection under the law because, had he committed the same offense after passage of Proposition 47, he would not have been subject to the legal duty to submit DNA. We discuss each of these arguments to the extent appropriate below.

#### **I. Does Reclassification of Minor's Offense Under Section 1170.18 Entitle Him to DNA Expungement?**

Minor's first argument is that, following reclassification of his felony offense as a misdemeanor, he no longer has a "qualifying offense" that would subject him to the duty to submit DNA under the DNA Database Act. As such, minor contends, the order requiring him to submit DNA should be vacated and his DNA samples should be expunged. (See § 296, subd. (a).) This argument is, in essence, one of statutory or voter-

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<sup>3</sup> The DNA Database Act was amended in 2004 through passage of Proposition 69 to "substantially expand[] the range of persons who must submit DNA samples to the state's forensic identification databank." (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1498.)

initiative interpretation, reviewed on appeal de novo. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212 [rules of statutory interpretation apply to voter initiatives]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176.) Accordingly, based upon the fundamental rule of statutory construction, we must ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213.) “To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning.” (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) “We do not, however, consider the statutory language in isolation; rather, we look to the entire substance of the statutes in order to determine their scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statutes’ nature and obvious purposes. [Citation.] We must harmonize the various parts of the enactments by considering them in the context of the statutory frame work as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.” (*People v. Cole* (2006) 38 Cal.4th 964, 975.)

According to minor, Proposition 47’s directive that reclassified offenses be treated as misdemeanors “for all purposes” (§ 1170.18, subd. (k)) means reclassified offenses are no longer qualifying offenses for purposes of the DNA Database Act. (See § 296, subd. (a)(1) [“Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under [§ 602] for committing any felony offense” shall provide DNA samples for law enforcement identification analysis].) As such, minor reasons, the juvenile court erred in finding otherwise.

In addition, minor argues the Legislature’s recent enactment of Assembly Bill No. 1492 (2015–2016 Reg. Sess.) (hereinafter, Bill No. 1492), which, among other things, amended section 299, subdivision (f) to state that a trial court is not authorized to relieve a defendant of his or her administrative duty to submit DNA when granting relief

under section 1170.18, is irrelevant to his case because: (1) the amendment was not intended to address DNA expungement, a separate subject covered by a different provision (to wit, section 299 (e)), and (2) in any event, the amendment constitutes an unconstitutional and, thus, invalid legislative alteration of Proposition 47.

We just recently addressed and rejected these arguments in *In re C.B.* (Aug. 30, 2016, A146277) \_\_ Cal.App.4th \_\_ [2016 Cal.App. Lexis 725]. In doing so, we concluded a felony offense reclassified as a misdemeanor under section 1170.18 should only be treated as a misdemeanor *going forward* from the time of reclassification and, thus, remains a qualifying offense for purposes of the DNA Database Act, precluding the offender from obtaining additional relief under section 1170.18 in the form of expungement. Applying the legal reasoning fully set forth in *In re C.B.*, we reach the same conclusion herein and, thus, reject minor’s contrary claims.

## **II. Does Retention of Minor’s DNA Samples Violate Equal Protection?**

Remaining for our consideration is minor’s related contention, not raised in *In re C.B.*, that authorizing the state to retain his DNA submissions would violate the equal protection clause of the state and federal constitutions. (See Cal. Const., Art. I, § 7; U.S. Const., 14th Amend.) Minor reasons as follows: “A juvenile offender adjudicated prior to passage of Proposition 47 is similarly situated to a juvenile offender adjudicated for the same offense after passage of the initiative. Both groups of juveniles have been adjudicated pursuant to the same justice system for the same conduct. The only difference is that one group was found to have broken the law prior to November 4, 2014, and the other group acted unlawfully afterwards. Even under the most lenient standard for equal protection review, there is no rational basis for treating the DNA collection and retention differently for these two groups of offenders.” We disagree.

The relevant constitutional principles are not in dispute. “ ‘The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.’ ” [Citation.] ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly*

*situated* groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ ” ” ” ( *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Moreover, where, “as here, a disputed statutory disparity implicates no suspect class or fundamental right, ‘equal protection of the law is denied only where there is no rational relationship between the disparity of treatment and some legitimate governmental purpose.’ ” [Citations.] ‘This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in “ ‘rational speculation’ ” as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review “whether or not” any such speculation has “a foundation in the record.” ’ [Citation.] To mount a successful rational basis challenge, a party must ‘ “negative every conceivable basis” ’ that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its ‘ “wisdom, fairness, or logic.” ’ ” ( *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 ( *Johnson*).)

Applying these principles to the case at hand, we first note that, to the extent minor suggests it is always improper for a statutory amendment to lessen a particular punishment or penalty for an offense going forward but not relating back, there is a wealth of case law holding otherwise. (E.g., *People v. Floyd* (2003) 31 Cal.4th 179, 188-189 [“Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim — including this court”]; accord *People v. Cruz* (2012) 207 Cal.App.4th 664, 674-680 [rejecting an equal protection challenge to a statutory amendment permitting broader and, in some cases, less severe sentencing options (such as drug diversion programs) only for persons sentenced on or after October 1, 2011].)

Moreover, even accepting for the sake of argument minor's threshold claim that the reclassification procedure under section 1170.18 creates two similarly situated classes of persons for purposes of the DNA Database Act, with the only distinguishing characteristic being whether the persons admitted or were found to have committed a particular offense before or after the statute's operative date, we can nonetheless identify several plausible or reasonably conceivable reasons for this disparate statutory treatment. For example, the decision to maintain in the state database the DNA samples submitted by defendants whose felony offenses have been reclassified as misdemeanors not only serves the public safety goal identified in Proposition 69 of enhancing criminal investigative tools available to law enforcement, it also avoids the administrative burden of having to purge this database of a significant number of DNA samples if these defendants were found to be entitled to expungement. (See Voter Information Guide, California General Election Tuesday November 2, 2004, Text of Proposed Laws, § II (Findings and Declarations of Purpose), page 135 [noting "the majority of violent criminals have nonviolent criminal prior convictions, and the majority of cold hits and criminal investigation links are missed if a DNA database or data bank is limited only to violent crimes"].) While minor questions whether expunging these additional samples would in fact create a significant administrative cost or burden for the State of California, any lack of certainty in this regard does not undermine our conclusion that plausible or reasonably conceivable reasons exist for the disparate treatment of reclassified offenders under section 1170.18.<sup>4</sup> (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 650 ["when

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<sup>4</sup> Minor requests that we strike respondent's brief in light of the references made therein to extra-record secondary material at pages 21, 23, 27 and 53. Minor further requests that we order respondent to file a new brief that complies with California Rules of Court, rule 8.204. This secondary material (to wit, data allegedly from a Department of Justice study) is not part of the record on appeal and is not the subject of any request for judicial notice by respondent. We thus agree with minor that respondent's references to this material are inappropriate, and therefore disregard them entirely for purposes of this appeal. (See *People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17, overruled in part on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) This ruling negates the need for respondent to file a new brief.

there is a reasonably conceivable justification for a classification, ‘[i]t is . . . “constitutionally irrelevant whether [the] reasoning in fact underlay the legislative decision” ’ [citations], or whether the ‘conceived reason for the challenged distinction actually motivated the legislature’ ”]; *Johnson, supra*, 60 Cal.4th at p. 881 [the underlying rationale need not be empirically substantiated].)

Accordingly, minor’s equal protection challenge fails under the legal authority set forth above. Simply put, minor has failed his burden to establish that the state lacked a rational basis for treating the identified categories of offenders differently for purposes of the DNA Database Act. (*Warden v. State Bar, supra*, 21 Cal.4th at p. 641.)

Thus, for the reasons provided, we affirm the juvenile court’s ruling to deny minor’s requests for vacation of the order requiring him to submit DNA samples and for expungement of his samples from the state database following the reclassification of his offense from felony to misdemeanor.

#### **DISPOSITION**

The juvenile court order denying minor’s requests to vacate the order to submit DNA samples and for an order to expunge his DNA records from the state database is affirmed.

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Jenkins, J.

I concur:

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McGuiness, P. J.

*In re J.E.*, A146105

POLLAK, J., — I dissent for the reasons stated in my dissent in *In re C.B.* (Aug. 30, 2016, A146277) \_\_ Cal.App.4th \_\_ [2016 Cal.App. Lexis 725].

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Pollak, Acting P.J.

*In re J.E.*, A146015